From: Joseph Bast
To: Microsoft ATR
Date: 1/17/02 10:44am
Subject: Microsoft Settlement

January 17, 2002

Ms. Renata B. Hesse
Antitrust Division
U.S. Department of Justice
601 D Street NW, Suite 1200
Washington, DC 20530-0001

SUBJECT: Microsoft Settlement

Dear Ms. Hesse:

I am writing to urge acceptance of the proposed Final Judgment offered by the U.S. Department of Justice and endorsed by nine state attorneys general to resolve the antitrust case against Microsoft Corporation.

I am president and CEO of The Heartland Institute, a 17-year-old independent nonprofit organization based in Chicago. Heartland produces research and

commentary on a wide range of public policy issues for the nation's 8,000 state and national elected officials. Our research efforts involve over 100 academics and 130 state elected officials who serve on advisory boards.

Last year, I edited and Heartland published Antitrust After Microsoft: The Obsolescence of Antitrust in the Digital Era, by attorney David Kopel. Kopel's findings are directly relevant to the proposed settlement and, I believe, argue in favor of the settlement being approved.

The proposed Final Judgment brings to an end, rightly so, litigation that has been rendered meaningless or counterproductive by changing market conditions. Since 1998, phenomenal increases have occurred in the power of computers, their ability to store information, and the speed of data transmission. Products that were once at the core of the Microsoft case have disappeared, changed dramatically, been superceded by others, or been sold or merged with others. The result is a product landscape that

would be almost unrecognizable to a juror or jurist studying Microsoft in 1998.

Technological change per se does not mean the Microsoft case was without merit. It certainly does not mean Microsoft is innocent of the illegal business practices it
is charged with. What is clear, though, is that Microsoft's actions have not stopped or even slowed the rate of technological innovation. Indeed, Microsoft products continue to play a major role in making much of that innovation possible.

The proliferation of new products and falling prices makes it difficult to defend the assertion that consumers were harmed during the 1990s by Microsoft's alleged monopolistic conduct. Evidence of any harm to consumers was conspicuously missing during the Microsoft trial. The absence in the proposed Final Judgment of payments or restitution to consumers or any of Microsoft's competitors is entirely appropriate for this reason.

Changing technology has transformed the market in which Microsoft competes. Competitors who once complained of Microsoft's market power have now merged with other competitors and become behemoths themselves. Microsoft faces serious competition from companies offering software and hardware products that weren't even invented when U.S. v. Microsoft was launched. Microsoft's core business?-writing the operating systems of personal computers-?is under serious challenge from Linux and (to a lesser extent) Apple.

The center of gravity for computing is shifting away from the PC and onto such devices as personal digital assistants and Web-enabled telephones. Microsoft's competitors still include AOL, Netscape, Sun, and Oracle, but many new names have been added to the list: IBM, Sega, Sony, Red Hat, Symbian, Phone.com, AT&T/TCI, 3Com, Yahoo!, and even Microsoft's former ally, Intel. Some, like Red Hat, are using Linux to compete with Microsoft head-to-head for control of the PC operating system market. Others work to shrink that market by using non-PC devices to do what PCs used to do, and by writing programs in languages that can be read by computers using any operating system. The rationale for treating Microsoft as a monopolist is evaporating with each passing month as the old battleground of the desktop PC becomes less and less relevant to consumers and to the IT industry.

The proposed Final Judgment prohibits Microsoft from engaging in business practices, such as retaliating against OEMs that promote or sell products that compete with Microsoft products, that the trial court, in line with Justice Department antitrust policies, found to be anti-competitive. The proposed settlement also requires that Microsoft surrender control over the desktop or Start Menu, and make some of its intellectual property available to ISVs, OEMs, and other partners on a

non-discriminatory basis. Compliance is ensured by requiring Microsoft to provide on-site office space for and access to its records and personnel to a 3-member Technical Committee and its staff.

Microsoft apparently agrees to these restrictions, so there is little reason to argue here that they are unnecessary, except as a counterpoint to those who believe such restrictions don't go far enough in handicapping Microsoft. The practices that the trial court found to be anti-competitive are used routinely and legally by other companies in the IT industry and in other industries; it is dubious whether there can be an objective definition of what constitutes "anti-competitive practices" or under what conditions "competitive" conduct becomes "anti-competitive." Microsoft's practice of giving discounts to computer manufacturers who help develop new versions of Windows, include hardware to take full advantage of Windows, and promote the Windows name is a standard practice in other industries that works to the benefit of consumers.

The antitrust trial showed how easily antitrust laws can be manipulated against almost any company--even a company whose success depends on continuously improving its products and lowering its prices. David Kopel concluded his analysis convinced that Microsoft was a victim of industrial policy gone awry. Government officials tried to "pick a winner": A Web browser they thought, wrongly, had the potential of becoming an applications platform that could eventually help another company compete successfully with Microsoft Windows in the operating system market. Microsoft's decision to launch and aggressively market its own Web browser--a browser that most computer magazine reviewers now say is superior to the regulators' Chosen One--ruined the plan and embarrassed its authors.

The original remedies sought against Microsoft have little to do with the company's supposed illegal conduct. In particular, the proposed breakup of the company into Operating and Applications Companies goes far beyond whatever would be necessary to stop anti-competitive behavior. Breaking up Microsoft would have forced American consumers to spend $50 billion to $125 billion more for software over a three-year period. Competition would not emerge. Innovation, far from being encouraged, would have been squashed. All companies and all industries that rely on the new digital technologies would have been hurt by Judge Penfield Jackson's proposed remedies.

I hope the court resists suggestions that the settlement "doesn't go far enough" in restricting Microsoft's freedom to compete or punishing it for competing too aggressively in the past. Justice in this case requires neither. The proposed Final Judgment protects the interests of consumers and producers by allowing Microsoft and its competitors to compete by producing the high-quality goods and services that consumers want.

As Illinois Attorney General Jim Ryan said when he joined eight other states and the Department of Justice by endorsing the settlement, "The battle has been won. It is time to move on."

Sincerely,

Joseph L. Bast
President
The Heartland Institute
19 S. LaSalle, Suite 903
Chicago, IL 60603
www.heartland.org
phone 312/377-4000
fax 312/377-5000
jbast@heartland.org